93-1596

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

Petitioner,

v.

DARRYL TRAVIS WATKINS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION OF THE STATE OF ALABAMA

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QUESTION PRESENTED

Respondent was tried for and convicted of capital robbery-murder in 1982. After obtaining two remands from the Alabama Supreme Court, counsel again petitioned that court for certiorari review; in 1987, he presented a claim pursuant to Batson v. Kentucky, 476 U.S.79 (1986), and asked for review under Alabama's plain error rule, Rule 39(k), A.R.A.P. The Alabama Supreme Court reviewed the claim, and found no plain error in the record.

Respondent sought post-conviction relief and asserted that counsel was ineffective in 1987 for failing to move for supplementation of the record with data to support the Batson claim. The circuit court denied relief but the Alabama Court of Criminal Appeals reversed, finding counsel ineffective.

The question presented is whether counsel rendered ineffective assistance when he failed to

move to supplement the record in 1987 with information about the racial composition of the 1982 venire and the race of the jurors struck, even though that information only became necessary after 1987, as a result of the subsequent developments in Batson law.

PARTIES

The caption contains the names of all of the parties to the proceedings in the courts below.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
A. Statement Of The Facts From Trial	4
B. Procedural History	5
REASON THE WRIT SHOULD ISSUE	10
THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF CRIMINAL APPEALS' JUDGMENT IS IN DIRECT CONFLICT WITH THE OPINIONS OF THIS COURT, OF FEDERAL COURTS, AND OF ALABAMA AND OTHER STATE COURTS, WHICH HOLD THAT EFFECTIVE ASSISTANCE OF COUNSEL DOES NOT INCLUDE A REQUIREMENT TO PRESENT CLAIMS BASED ON HOW THE LAW MAY DEVELOP	10
CONCLUSION	23

TABLE OF AUTHORITIES

	PAGE(S)
Batson v. Kentucky, 476 U.S. 79 (1986).....	10
Booth v. Maryland, 482 U.S. 496 (1987).....	19
Commonwealth v. Polston, 420 Pa. Super. 233, 234, 616 A.2d 669, 680 n. 5 (1992).....	21
Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989).....	18
Duren v. State, 590 So.2d 360, 365 (Ala.Crim. App. 1990), aff'd, 590 So. 2d 369 (Ala. 1991).....	19
Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified, 833 F.2d 250 (1987) cert. denied, 108 S.Ct. 1487 (1988).....	18
Enmund v. Florida, 458 U.S. 782 (1982), cert. denied, 113 S.Ct. 374 (1992).....	18
Ex parte Branch, 526 So.2d 609 (Ala. 1987).....	15
Ex parte Watkins, 509 So.2d 1074, 1076 (Ala. 1987).....	13
Hall v. State, 853 S.W.2d 756, 759 (Tex.App. 1993).....	20-21

TABLE OF AUTHORITIES (CONT'D)

PAGE(S)

Magwood v. State,
553 So.2d 635, 638 (Ala.Crim. App. 1989), cert. denied, 553 So.2d 635 (Ala. 1989)..... 19

Michigan v. Mosley,
423 U.S. 96 (1975)..... 18

Procter v. Butler,
831 F.2d 1251 (5th Cir. 1987), cert denied, 482 U.S. 916 (1988)..... 18

Smith v. Murray,
477 U.S. 527 (1986)..... 17

State v. Tarver,
No. CR-91-1494, slip op. at 3-4 (Ala.Crim.App. March 26, 1993), aff'd on return to remand (Ala. Crim.App. February 11, 1994)..... 19

Strickland v. Washington,
466 U.S. 668 (1984)..... 11

Swain v. Alabama,
380 U.S. 202 (1965)..... 14

A.R.A.P.

Rule 10(f)..... 14

Rule 39(k)..... 25

OPINIONS BELOW

The September 30, 1992 opinion of the Alabama Court of Criminal Appeals, reversing the circuit court's denial of post-conviction relief (Alabama Court of Criminal Appeals No. CR-90-989), is not yet reported. The opinion is reproduced as Appendix A in the Appendix volume accompanying this Petition.[1] The November 25, 1992 order of the Alabama Court of Criminal Appeals denying the State's Application for Rehearing is reproduced as Appendix B. The Alabama Supreme Court order granting the State's Petition for a Writ of Certiorari is reproduced as Appendix C. The January 7, 1994 Alabama Supreme Court order quashing certiorari is reproduced as Appendix D. The February 19, 1991 order of the circuit court of Jefferson County denying post-conviction relief is reproduced as Appendix E.

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[1]The Appendix to this Petition is separately bound pursuant to Rule 14.1(k).

JURISDICTION

The order of the Alabama Supreme Court quashing the writ of certiorari was issued January 7, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

Rule 10(f), Alabama Rules of Appellate Procedure, provides:

> Correction or modification of the record.
>
> If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative,

> may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

Rule 39(k), Alabama Rules of Appellate Procedure, provides, in pertinent part:

> In all cases in which the death penalty has been imposed, upon review of the opinion of the court of criminal appeals on certiorari, the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner.

STATEMENT OF THE CASE

Respondent Darryl Travis Watkins was convicted of capital murder and sentenced to death for the 1980 robbery-murder of an elderly man in Birmingham, Alabama. The conviction and sentence were ultimately affirmed by the Alabama courts, and this Court denied certiorari. Respondent sought state post-conviction relief and claimed, among other things, that he was denied the effective assistance of counsel. The circuit court denied post-conviction relief, but

the Court of Criminal Appeals reversed that judgment as to the effective assistance of counsel issue. The Alabama Supreme Court granted the State's petition for a writ of certiorari, but later quashed the writ.

A. Statement Of The Facts From Trial

Respondent murdered 79-year-old Milton Mayfield during a robbery of a meat market in Birmingham, Alabama on November 26, 1980. Respondent shot the victim at close range, after he failed to comply with Respondent's directive to move away from the counter. (R. 171)[2] According to one witness, Mr. Mayfield did not comply because he could not hear over the noise of the meat slicing machine he was operating. (R. 171) Respondent was identified by three eyewitnesses as the man who killed Mr. Mayfield. (R. 170, 235, 246)

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[2] "R. ___" refers to pages of the 1982 trial transcript.

The jury found Respondent guilty and recommended that he receive the death sentence. (R. 382, 410) After another sentence hearing, the trial judge sentenced Respondent to death. (R. 415)

B. Procedural History

Respondent was indicted on April 10, 1981 on a charge of robbery-murder, pursuant to §13A-5-31(a)(2), Code of Alabama (1975)(repealed). J. Louis Wilkinson was appointed to represent him at trial (R. 417), and he represented Respondent throughout the trial and during the convoluted appellate process in the Alabama courts that consumed 5 years.

Initially, the Court of Criminal Appeals affirmed the conviction and sentence. Watkins v. State, 509 So.2d 1056 (Ala.Crim.App. 1983). On certiorari, the Alabama Supreme Court affirmed in part, but ordered remand of the cause for a determination of whether belated disclosure of a police report substantially affected Respondent's

right to a fair trial. Ex parte Watkins, 509 So.2d 1064 (Ala. 1984).

On remand, the trial court found that the belated disclosure of the police report did not substantially affect Respondent's right to a fair trial and that it did not affect the outcome of the trial. On return to remand, the Court of Criminal Appeals incorporated in its opinion the trial court's findings of fact, and affirmed the conviction and sentence. Watkins v. State, 509 So.2d 1067 (Ala.Crim.App. 1985). That Court denied rehearing on January 7, 1986.

On certiorari to the Alabama Supreme Court, Respondent raised, for the first time, a claim that a juror who merely expressed strong disapproval of the death penalty was erroneously struck from the jury. That Court granted the writ and remanded the cause to the Court of Criminal Appeals for examination for this newly raised claim. Ex parte Watkins, 509 So.2d 1071 (Ala. 1986). After remandment, the Court of Criminal Appeals again affirmed the conviction and death sentence, finding that the trial court

did not err in striking the juror for cause. Watkins v. State, 509 So.2d 1071 (Ala.Crim.App. 1986).

On November 26, 1986, following the second remand, Respondent again petitioned the Alabama Supreme Court for a writ of certiorari to review the Court of Criminal Appeals' judgment and, in his February 18, 1987 reply brief, he raised a claim pursuant to the newly released decision, Batson v. Kentucky, 476 U.S. 79 (1986).

The Alabama Supreme Court reviewed the Court of Criminal Appeals' judgment and the newly raised Batson claim, and affirmed. With regard to the Batson claim, the court held that it could not find any plain error based on the record because the record did not raise an inference of discrimination and it did not show that the State exercised any of its peremptory strikes to remove black veniremembers. Ex parte Watkins, 509 So.2d 1074, 1076 (Ala. 1987). This Court denied certiorari. Watkins v. Alabama, 484 U.S. 918 (1987).

On February 15, 1988, Respondent filed a petition for a writ of habeas corpus in the circuit court of Jefferson County. On February 19, 1992, after Respondent filed additional claims and an evidentiary hearing was held, the circuit court denied relief. (Appendix E) With regard to Respondent's claim that counsel on appeal was ineffective because he did not seek to supplement the record pursuant to Rule 10(f), A.R.A.P., to show that black veniremembers were struck, the court held that Rule 10(f) did not apply. It held also that when the Alabama Supreme Court considered the Batson claim on direct appeal, it could have ordered supplementation if it considered supplementation necessary. (Appendix E, p. 28)

Respondent filed an untimely notice of appeal, and the appeal was dismissed as untimely filed. Upon Respondent's motion, the dismissal was set aside and the cause was restored to the Court of Criminal Appeals' docket.

On September 30, 1992, the Court of Criminal Appeals issued an opinion in which it held that

appellate counsel should have moved to supplement the record in the Alabama Supreme Court in 1987 when he raised the Batson claim, and that his failure to do so was deficient performance. The Court of Criminal Appeals remanded the cause for a Batson hearing to provide Respondent with the opportunity to make out a prima facie case of discrimination in the jury selection process. (Appendix A) Two members of the Court of Criminal Appeals dissented from the three-member majority's holding.

On October 14, 1992, the State filed a timely application for rehearing, which the Court of Criminal Appeals overruled on November 25, 1992.

The State petitioned the Alabama Supreme Court for certiorari review on December 9, 1992; certiorari was granted on February 24, 1993. (Appendix C)

On January 7, 1994, the Alabama Supreme Court issued an order quashing the writ as improvidently granted. (Appendix D) Four members of the Alabama Supreme Court dissented,

arguing that when he presented the Batson claim in 1987, counsel raised the issue properly under the law as it existed at that time. (Appendix D, pp. 4-8)

REASON THE WRIT SHOULD ISSUE

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF CRIMINAL APPEALS' JUDGMENT IS IN DIRECT CONFLICT WITH THE OPINIONS OF THIS COURT, OF FEDERAL COURTS, AND OF ALABAMA AND OTHER STATE COURTS, WHICH HOLD THAT EFFECTIVE ASSISTANCE OF COUNSEL DOES NOT INCLUDE A REQUIREMENT TO PRESENT CLAIMS BASED ON HOW THE LAW MAY DEVELOP.

The Court of Criminal Appeals held that, in 1987 when counsel raised a claim pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), on certiorari following the second remand from the Alabama Supreme Court, he should have attempted to supplement the record to show the racial composition of the venire and the race of each veniremember struck by the prosecution in Respondent's 1982 trial. This holding conflicts with the established principles of law announced by this Court, and by federal and state courts, because this Court and others have repeatedly

held that counsel do not have to predict the future development of the law in order to provide effective assistance.

A defendant cannot succeed on an ineffective assistance of counsel claim unless he proves deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). Strickland mandates that when reviewing a claim of ineffective assistance of counsel, the reasonableness of counsel's actions be judged as of the time of counsel's conduct. 466 U.S. at 690. The time of counsel's conduct here is February 18, 1987, when he raised the Batson claim. In his brief on this claim, counsel argued:

> The criteria set out in Batson v. Kentucky, supra, provides that to establish a prima facie case of descrimination [sic] the appellant must show the following:
>
> (1) The appellant is a member of "a cognizable racial group" and "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."
>
> (2) That "peremptory challenges constitute a jury selection practice that permits 'those to discriminate

who are of a mind to discriminate.'" (This element is a given.)

(3) That the prosecutor excluded veniremen from the jury on the basis of their race.

The appellant argues that he has presented a prima facie case of discrimination, in that he is black and blacks were struck from the venire by the prosecutor's use of peremptory challenges.

Appellant is aware that this issue has not been presented previously, but under the plain error exception to Rule 39(k), A.R.A.P., the appellant would request that this Court review the issue since it has "adversely affected the substantial rights of the petitioner."

(SR. 534-535)[3]

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[3]"SR. ___" refers to pages of the supplemental record in this post-conviction proceeding.

Counsel not only raised a new issue based on a case decided four years after trial, he did so in language that virtually paralleled the language used by this Court in the Batson decision. Counsel's actions at that time were reasonable and, in fact, he succeeded in obtaining plain error review by the Alabama Supreme Court. Ex parte Watkins, 509 So.2d 1074, 1076 (Ala. 1987).[4] This does not support a finding of ineffective assistance of counsel.

The Court of Criminal Appeals held that counsel's performance was unreasonable, however, because when he raised the issue, he did not move to supplement the record with data showing the number of blacks on the venire and race of the veniremembers struck by the prosecution.

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[4]When it reviewed the claim, the court noted that the record did not disclose the prosecutor's strikes or the race of the veniremembers struck, but it did not remand the cause in order for that information to be included in the record, which it could have done at that time. It reviewed the existing record and found no plain error.

(Appendix A, pp. 25-26). The Court of Criminal Appeals stated that this was "necessary" and "desired" Batson information (Appendix A, pp. 11, 14), that the information was proper for a motion pursuant to Rule 10(f), A.R.A.P., and that the motion would have been granted.

In 1982, when Respondent was tried for this robbery-murder, Swain v. Alabama, 380 U.S. 202 (1965), controlled objections to the prosecutor's peremptory challenges as being based on race. The fact that a prosecutor struck any or all black veniremembers in one case did not establish a Swain claim because the proof required under Swain was that the prosecutor systematically excluded all black veniremembers over time. 380 U.S. at 223-224. At the evidentiary hearing in this case, counsel testified that he did not object to the prosecutor's strikes at trial because he did not believe he had a valid objection based on Swain; as a result, the record of the prosecution's peremptory strikes and the racial composition of the venire was not ever

included in the record.[5] (Hearing R. 18, 63-64) It is precisely this information, however, that the Court of Criminal Appeals determined was "necessary" and "desired".

This Court in Batson deliberately avoided formulating particular procedures to be followed in implementing its judgment. 476 U.S. at 99-100 n. 24. The Alabama Supreme Court first announced general guidelines for lower courts in Ex parte Branch, 526 So.2d 609 (Ala. 1987). In Ex parte Branch, the court "set forth the showing required by a defendant in order to raise a Batson challenge". 526 So.2d at 616. Also in Ex parte Branch, the court stated for the first time that the evidence relevant to ruling on a Batson claim "should become a part of the trial record so that there will be a sufficient record for appellate

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[5]The list of veniremembers and the jury strike sheets are not usually included in the trial record. Magwood v. State, 553 So.2d 635, 639 (Ala.Crim.App. 1989); Cochran v. State, 548 So.2d 1062, 1070 (Ala.Crim.App. 1989), cert. denied, 493 U.S. 900 (1989).

review." 526 So.2d at 622. The court also stated that it was simply illustrating the types of evidence, based on recent developments in the case law, that could be used and that, "Certainly, as the law develops, more may be added." 526 So.2d at 625.

Thus, when Respondent was tried in 1982, there were no guidelines for making a Batson claim and there were no guidelines for preserving a record to establish a Batson claim; no guidelines for establishing a Batson claim were set forth in Alabama until 1987.[6] In holding that trial counsel's performance was deficient because he failed to put forth the "necessary Batson information" when no court had yet determined what information was necessary, the

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[6]Over two years later, the Alabama Supreme Court acknowledged that, despite the attempt made in Ex parte Branch to avert confusion, there had nonetheless been "a great amount of confusion over the interpretation to be given to Batson". Harrell v. State, 555 So.2d 263, 265 (Ala. 1989)(further attempting to clarify Batson analysis).

Court of Criminal Appeals found counsel ineffective because he failed to forecast changes in the law. This decision is irreconcilable with established precedent.

In Strickland v. Washington, this Court clearly stated that a fair assessment of counsel's performance requires an evaluation of counsel's actions from counsel's perspective at the time, with every effort made to "eliminate the distorting effects of hindsight." 466 U.S. at 689. In Smith v. Murray, 477 U.S. 527 (1986), this analysis was applied. After counsel in that case chose not to even pursue a claim on appeal that later case developments suggested would have succeeded, this Court refused to find counsel ineffective, and instead reiterated from Strickland v. Washington the standard that a fair assessment of attorney performance requires an evaluation of his conduct from counsel's perspective at the time.

Numerous federal courts of appeal have followed this mandate and have held that effective representation does not include the

requirement to predict future developments in the law. E.g., Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989) (counsel not ineffective for failing to object to imposition of death penalty for unintentional murder, because Enmund v. Florida, 458 U.S. 782 (1982), questioning imposition of death penalty for felony murder had not yet been decided), cert. denied, 113 S.Ct. 374 (1992); Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified, 833 F.2d 250 (1987) (failure to object at trial to reinterrogation in conjunction with Miranda warnings before Michigan v. Mosley, 423 U.S. 96 (1975) was released not ineffective), cert. denied, 108 S.Ct. 1487 (1988); Procter v. Butler, 831 F.2d 1251 (5th Cir. 1987) (counsel not ineffective for failing to make Batson objection in 1976 trial), cert. denied, 482 U.S. 916 (1988).

In addition, Alabama courts have properly refused to find counsel ineffective for failing to predict future developments in the law. E.g., State v. Tarver, No. CR-91-1494, slip op. at 3-4 (Ala.Crim.App. March 26, 1993)(counsel not

ineffective for failing to make a Batson objection in a pre-Batson case), aff'd on return to remand (Ala.Crim.App. February 11, 1994); Duren v. State, 590 So.2d 360, 365 (Ala.Crim.App. 1990)(counsel not ineffective for failing to object to victim impact argument because Booth v. Maryland, 482 U.S. 496 (1987) was decided three years after trial), aff'd, 590 So.2d 369 (Ala. 1991); Magwood v. State, 553 So.2d 635, 638 (Ala.Crim.App. 1989)(counsel not ineffective for failing to raise a Batson objection in 1982 trial), cert. denied, 553 So.2d 635 (Ala. 1989)[7]

Not only did the Court of Criminal Appeals in this case condemn counsel for his inability to predict the substantial developments in Batson

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[7]The Court of Criminal Appeals in Magwood also held that, even though the direct appeal was pending when Batson was announced, counsel was not ineffective for failing to even raise a Batson issue or to move to supplement the record on appeal with the racial composition of the venire or the race of the jurors struck. 553 So.2d at 639-640. Counsel in the present case surpassed the performance of Magwood's counsel by raising the Batson issue on appeal, yet he was found ineffective while Magwood's counsel was not!

law, but the court's own analysis is based almost exclusively on recently decided cases that, themselves, apply the procedural developments in Batson law that did not exist in 1987 when counsel raised his Batson claim. (Appendix A at 23-26) The court's citation to several recent cases which have been remanded for Batson hearings vividly emphasizes the error in the Court of Criminal Appeals' decision, that is it refused to evaluate counsel's conduct from his perspective at the time and it instead specifically relied on the 20/20 vision hindsight so often provides.

The Court of Criminal Appeals' failure to "eliminate the distorting effects of hindsight" which Strickland v. Washington, 466 U.S. at 689 requires further contributed to the anomalous, unjust result that the court reached in this case.

Courts in other states also follow Strickland v. Washington, and refuse to find counsel ineffective for failing to predict future legal developments. See, e.g., Hall v. State, 853 S.W.2d 756, 759 (Tex.App. 1993); Commonwealth

v. Polston, 420 Pa. Super. 233, 234, 616 A.2d 669, 680 n. 5 (1992).

The analysis applied by the Court of Criminal Appeals in this case cannot be reconciled with the analysis followed by this Court, federal circuit courts, courts in other states, and Alabama courts in other cases, which have consistently refused to hold counsel's performance ineffective for failing to forecast developments in the law. Accordingly, review of the decision below is necessary to ensure that the Alabama Court of Criminal Appeals applies the standards set forth by this Court in Strickland v. Washington in the same manner as this Court and the federal courts of appeal do, and in the same way Alabama's and other states' courts have applied the test in other ineffective assistance of counsel cases.

The decision below, if allowed to stand, will have a substantial adverse effect on the administration of justice and on the finality of judgments in Alabama. Each year, thousands of convicted criminals file post-conviction

proceedings in state and federal courts and raise ineffective assistance of counsel claims. If the Strickland v. Washington standards are ignored and defendants can succeed on claims based purely on hindsight and developments in the law that occurred months or years after trial, the sense of finality due to criminal judgments will be seriously compromised. The concept of providing reasonably effective assistance of counsel under the circumstances of the case will have no meaning, because all Alabama courts will be free to judge counsel's conduct by whatever law exists when the case is presented to that court for post-conviction review. The decision below therefore merits the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1994